Ancillary relief Khanna Summons legal professional privilege

Ref:	**Master 50**

Judgment: approved by the Court for handing down (subject to editorial corrections)*

Delivered:	**05/09/07**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION (PROBATE AND MATRIMONIAL)

BETWEEN:

M

Petitioner;

v

M

Respondent.

(2 of 2007)

MASTER REDPATH

This matter arose during the course of a hearing of the above application for ancillary relief when a "Khanna" Summons was served on a solicitor who had previously acted in a property transaction for the Petitioner and Respondent and the Respondent's parents.

The transaction in question was the transfer of a holiday villa in Portugal from the parents of the Respondent to the Petitioner and Respondent as joint tenants. The consideration for the transfer was stated to be £200,000.00. It was alleged on behalf

of the Petitioner that the property could now be worth as much as £2,000,000.00. It was accepted by the Respondent that he had raised £200,000.00 to fund the transaction but he alleged that the transaction was never completed. The "Khanna" summons was issued to the solicitor involved in the conveyancing to bring her to court along with the conveyancing file in question, to resolve the issue of whether the transfer ever took place.

The use of "Khanna" summonses, is becoming more prevalent in ancillary relief cases, as is, I regret to say, the tendency of parties to endeavour to conceal assets. For both reasons I indicated that I would give written judgment in this application.

At the hearing of the summons objection was raised by Counsel for the Respondent, Senior Counsel for the Solicitor in question and a different Solicitor for the parents of the Respondent. The thrust of the objections was that the conveyancing file was protected by legal professional privilege, that this privilege had not been waived by the Respondent or his parents (who were not parties to the ancillary relief application) and that accordingly the Solicitor had no right to produce the file. It should be noted that on the date that judgment was handed down, the Respondent waived his objection.

I should state at the outset that I can understand the stance taken by the Solicitor who received the Summons in this case. It is quite clear that no solicitor should, without considerable reflection, produce confidential files belonging to clients in a situation where some of those clients object.

The issue of Khanna Summonses was considered in the case of Khanna v Lovell White Durrant (a firm) reported at [1994] 4All ER at 267.

In that case such a Summons was issued to an Assistant Solicitor. It was accepted by the Court that the Rules of the Supreme Court did not specifically cover this type of summons. The Court noted that it was particularly appropriate that such a summons should issue in a case where the production of documents at, and not before the trial, could create difficulties for the running of the trial.

The practice was first suggested by Sir John Donaldson MR and a practice developed along the lines suggested by him in the Chancery Division and in the Commercial Court in the High Court of England and Wales. Sir Donald Nichols V.C. notes in the Khanna judgment at page 270:-

> "The practice has much to commend it. As between the parties to the action, the production of the documents pre-trial is likely to save costs and to further the interests of justice rather than impede them".

During the course of the Khanna v Lovell White Durrant (a firm) hearing a sustained attack was made on the practice by Counsel for the Applicant who wished to have the Summons set aside. The learned judge continues at page 271:-

> "I accept that, as the new practice has developed, the date fixed as the commencement of the trial but for the purposes only of receiving documents from a non party

> served with a subpoena is usually not the date of commencement of the trial in the ordinary sense of that expression. However, that does not mean that the new practice is flawed. The Court has a wide measure of control over the manner in which the trial will be conducted, including the manner in which it will receive evidence. If this course is just and convenient, discrete issues or aspects of the trial can be dealt with separately and on different occasions".

In this particular case, the ancillary relief hearing was already ongoing when the Summons was issued and a time outside of the running of the case was set aside for hearing this Summons. I think it is proper in the majority of cases where a Khanna Summons is issued that the application should be heard by a Master who is not hearing the case itself. In this case no objection was raised to me hearing the Summons and I was not adverted to any prejudice that might arise as a result of me so hearing it.

As I have already indicated objection was taken to the production of this file on the basis of legal professional privilege. Such privilege has two basic strands. To quote Matthews and Malek's Discovery at paragraph 8.06:-

> "There are two distinct kinds of legal privilege. One applies whether or not litigation is contemplated or pending, but covers a narrow range of documents; it is often called "advice" privilege for short. The other

applies only where litigation is contemplated or pending but extends over a wider range of documents; this is often referred to as "litigation" privilege. The rationale of both kinds is the same, and was explained by Lord Brougham as follows:

> 'It is founded on a regard to the interest of justice which cannot be upholden and to the administration of justice which cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all everyone would be thrown upon his own legal resources: deprived of all professional assistance a man would not venture to consult any skilful person or would only dare to tell his Counsel half his case'". Greenough v Gaskell (1833) 1MYL.K 98 of 103.

Clearly this conveyancing file was not compiled with a view to litigation, and accordingly if privilege attaches to it at all, it must fall under the strand of legal advice privilege.

Matthews and Malek continue at paragraph 8.10:-

> "Communications between a lawyer in his professional capacity and his client are privileged from production if there are confidential and for the purposes of seeking or giving legal advice for the client. However, those purposes have to be construed broadly, and will include communications in "the continuum aimed at keeping [Solicitor and Client] informed," and "must include advice as to what should prudently and sensibly be done in the relevant legal context". (Balabel v Air India [1988] CH.317 at 332.

The issue of legal professional privilege was examined in depth by the House of Lords in 2004 in the case of Three Rivers District Council & Ors v Governor & Company of the Bank of England [2004] UKHL489. Lord Scott of Foscote notes at paragraph 24 onwards of the judgment:-

> "24. First, legal advice privilege arises out of a relationship of confidence between lawyer and client. Unless the communication or document for which privilege is sought is a confidential one, there can be no question of legal advice privilege arising. The confidential character of the communication or

document is not by itself enough to enable privilege to be claimed but is an essential requirement.

25. Second, if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and it can be overridden by statute …. but it is otherwise absolute. There is no balancing exercise that has to be carried out see B v Auckland District Law Society [2003] 2AC 736 paragraphs .46 to 54). The Supreme Court of Canada has held that legal professional privilege although of great importance is not absolute and can be set aside if a sufficiently compelling public interest for doing so, such as public safety, can be shown … But no other common law jurisdiction has, so far as I am aware, developed the law of privilege in this way. Certainly in this country legal professional privilege, if it is attracted by a particular communication between lawyer and client or attaches to a particular document, cannot be set

> aside on the ground that some other higher public interest requires that to be done".

Lord Scott went on to consider the scope of legal advice privilege at paragraph 35 of the judgment:-

> "Legal advice privilege should, in my opinion, be given a scope that reflects the policy reasons that justify its presence in our law. In my respectful opinion, the approach of the Court of Appeal in the Three River (No 6) judgment has failed to do so. The Court of Appeal has restricted the scope of legal advice privilege to material constituting or recording communications between clients and lawyers seeking or giving advice about their client's legal rights and obligations. It has excluded legal advice sought or given for presentational purposes (see para. 13 above). The particular issue to be decided under the disclosure application of 1st August 2003 was whether advice that related to the presentation of material to the enquiry qualified for legal advice privilege. In holding that it did not, the Court of Appeal distinguished between a lawyer client relationship "formed for the purpose of obtaining advice or assistance in relation to rights and liabilities" and a lawyer client relationship where "the dominant purpose is not the obtaining of advice and assistance in relation

> to legal rights and obligations". In relation to the former, "broad protection will be given to communications passing between solicitor and client in the course of that relationship"; in relation to the latter, a similar broad protection could not be claimed".

The House of Lords felt that this distinction was not justified and held that the scope of legal advice privilege covered both direct legal advice as between lawyer and client and advice on presentational matters arising out of that advice.

It is clear however that their Lordships had to the forefront of their minds in deciding the case the important question of ensuring that such claims to legal professional privilege be kept to a permissible minimum. Lord Carswell states at paragraph 86:-

> "86. Determining the bounds of privilege involves finding the proper point of balance between opposing imperatives, making the maximum relevant material available to the court of trial and avoiding unfairness to individuals by revealing confidential communications between their lawyers and themselves. The practice which has developed is a reconciliation between these principles … there is a considerable public interest in each of these. The importance of keeping to a minimum the withholding of relevant material from the Court, upon which Mr Pollock laid emphasis, is self-

> evident. It was stressed by Wigmore (Evidence volume 8, para 2291 McNaughton RED.1961), who expressed the opinion that the privilege should be strictly confined within the narrowest plausible limits consistent with the logic of its principle, an approach echoed in the speech of Lord Edmond Davies Waugh v British Railways Board [1980] AC521 at 543. The competing principle of legal professional privilege is also rooted in public policy: see B v Auckland District Law Society [2003] 2AC 736 paragraphs .46 to 54).which I have previously quoted. It is not based upon the maintenance of confidentiality, although in earlier case law that was given as its foundation. If that were the only reason behind the principle the same privilege would be extended to such confidants as priests and doctors, whereas it has been a settled line of authority stemming from the Duchess of Kingston's case (1776) 1 EAST PC469 that it is confined to legal advisors".

In his judgment Lord Carswell carefully examines the authorities relating to this issue and concludes at paragraph 102:-

> "102. The conclusion to be drawn from the trilogy of nineteenth century cases to which I have referred and the qualifications expressed in the modern case law is that communications between parties and their solicitors

and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged but only when the following conditions are satisfied:

(a) litigation must be in progress or in contemplation;

(b) the communications must have been made for the sole or dominant purpose of conducting that litigation;

(c) litigation must be adversarial not investigative or inquisitorial".

Lord Carswell goes on to state at paragraph 105:-

"105. Mr Sumption submitted, in my opinion correctly, that the case law established that, so far from legal advice privilege being an outgrowth and extension of litigation privilege, legal professional privilege is a single integral privilege, whose sub-heads are legal advice privilege and litigation privilege, and that it is litigation privilege which is restricted to proceedings in a court of law in the matter which the authorities shows".

Lord Roger of Earlsbury in his judgment also referred to a distinction that may be drawn in cases where the proceedings are investigative rather than adversarial. It

has always been in the nature of ancillary relief proceedings that they include an investigative element, although the proceedings themselves will be largely adversarial. Indeed the Family Proceedings (NI) Rules 1996 explicitly state at Rule 2.65:-

> "(5) At the hearing of an application for ancillary relief the Master shall, subject to rules 2.65 and 2.66, investigate the allegation made in support of and in answer to the application, and may take evidence orally and may at any stage of the proceedings, whether before or during the hearing, order the attendance of any person for the purposes of being examined or cross-examined, and order the discovery and production of any document or require further affidavits".

This issue was considered by Coleridge J in Kimber v Brookman Solicitors [2004] 2FLR at 222. In that case a solicitor was brought to court to provide the judge with all documentation in his possession which would establish the address at which the Respondent resided, any other address which he had resided in for the previous two years, any telephone numbers or other contact details which the solicitor had in relation to the Respondent and lastly, and most importantly for the purposes of this application, the Respondent's banking details and/or the extent of the Respondent's assets and means and the whereabouts thereof. Coleridge J states at paragraph 15 of the judgment:-

> "The situation in this case is that this is an application by a wife under the Matrimonial Causes Act 1973 for

ancillary relief. As such, the court has a statutory duty to inquire into the parties means. It is not just a question as between two clients. It is a question between the court and the parties. The court has an inquisitorial function, not merely an arbitration function as between the two parties. This puts the court, it seems to me, in a different position to that more conveniently found in civil litigation generally.

16. Secondly, there is a clear duty in this type of proceeding, as set out in the rules, on both parties to make full, complete and frank disclosure to the court of their means. In this case the husband has failed to abide by the rules and also is in breach of the orders of the court. He therefore forfeits, in my judgment, any entitlement in relation to retaining the usual cloak of legal privilege.

17. Thirdly, of course and importantly, he is, it is clear, taking every conceivable step he can to defeat his wife's legitimate claim. Whether or not she is claiming too much, I know not. All I know is that the actions which he has taken, on the face of it, appear to be designed to defeat her proper claim ….

18. … accordingly, even if the husband is not in contempt of court, the public interest is fully engaged in this application and it is in the public interest to get to the bottom of where this man is and what he has done with the parties resources".

Another case of this type is Varma v Varma and Acanthus Investments Limited Family Law Volume 32 at page 503. In that case in a wife's application in ancillary relief proceedings, Wilson J relied upon a judgment of Ricks J in Dubai Aluminium Company Limited v Al Alawi & Ors [1991] 1WLR 1964 and allowed into evidence eight sheets of paper relating to Swiss bank accounts held by the Respondent Corporation. On four of the sheets, the sender's identity had been obscured by the wife's solicitors; similarly on attendance notes relating to discussions with English enquiry agents, the name of the agents was eliminated. The husband applied for disclosure of their identities and it was held that the solicitor had to disclose the identities of the senders of each of the documents.

These two cases follow an established line of authority applying to ancillary relief proceedings.

As I have already said, Lord Roger of Earlsferry in his judgment referred to the distinction between investigative and adversarial proceedings. He also noted that the European Court of Human Rights had held that to comply with Article 6 of the Convention that proceedings should be adversarial and not inquisitorial. He relied upon the authority of Lobo Machado v Portugal [1996] 23 EHRR at 79. That case involved an appeal to the Supreme Court of Portugal which was heard in private and decided on the basis of an opinion provided by the Deputy Attorney General to the Court with the Appellant being given no right of audience. The judgment states at para. 31:

> "31. Regard being, had, therefore, to what was at stake for the Applicant in the proceedings in the

> Supreme Court and to the nature of the Deputy Attorney-General's Opinion, in which it was advocated that the appeal should be dismissed, the fact that it was impossible for Mr Lobo Machado to obtain a copy of it and reply to it before judgment was given infringed his right to adversarial proceedings. That right means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the Court's decision".

I cannot see that this authority has any bearing on ancillary relief proceedings in this jurisdiction.

Accordingly, I tend to the view that in ancillary relief proceedings, the court may in appropriate cases lift the veil of legal professional privilege if there is evidence of fraud or wilful failure to make full disclosure.

To return to the instant case, legal professional privilege has been claimed for the conveyancing file in relation to the disputed transaction which I referred to at the start of this judgment. Does a conveyancing file fall within the fairly tightly prescribed scope of legal professional privilege as described by Lord Carswell in the Three Rivers Case?

The authorities would tend to suggest that it does not. In the case of Regina v Inner London Crown Court, ex parte Baines & Baines (a firm) and Anor [1988] QB 579 a firm of Solicitors were required by the police to hand over a conveyancing file, the request being made pursuant to the Police and Criminal Evidence Act 1984. On an application for Judicial Review the Solicitors made the case inter alia that the file was subject to legal professional privilege. Watkins LJ rejected this submission and states at page 6 of the judgment:-

> "In many conveyancing transactions advice will be given by the solicitor to his client upon factors which serve to assist towards a successful completion, the wisdom or otherwise of proceedings with it, the arranging of a mortgage and so on. I doubt if it can possibly be denied that advice of that kind is a privileged communication. But with one possible exception the constable by the notice does not seek production of material in connection with the giving of advice. He seeks records of the conveyancing transaction itself. …
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> That still leaves the main issue to be resolved, namely is conveyancing matter of itself privileged as coming within the meaning of the giving of advice: We were referred to no authority. I doubt that any is needed for the proposition that the document known as the conveyance is not clothed with privilege and I do not

> see why conveyancing matter, as I have called it, can validly be said to be, seeing that in my opinion in common sense it cannot be called advice consisting as it does of records of the financing of the purchase of, in this case, a house".

Matthews and Malek also conclude at para 8.13:

> "The rule covers communications, and does not therefore cover all documents relating to a client's affairs, for example, the conveyancing documents by which a movable property is transferred from one person to another".

Nor does it extend to all information which a lawyer knows about his client in Dwyer v Collins (1852) 7EXCH 639 at 648 it was said that:

> "The privilege does not extend to matters of fact which the attorney knows by any other means in confidential communication with his client, though if he had not been employed as attorney, he probably would not have known them".

The important aspects of this file to be considered by the court are whether or not any contract was concluded, whether any transfer was concluded and if not the reasons why the transaction failed to complete when clearly all parties originally intended it to complete.

The issue of what might be called material collateral to communications made for the purpose of seeking and receiving legal advice was also dealt with in the case of Regina v Manchester Crown Court ex parte Rogers [1999] 1WLR 8932 Lord Bingham of Cornhill states at page 7 of the judgment:-

> "In this case we must consider the function and nature of the documents of which we are concerned. The record of time on an attendance note, on a timesheet or fee record is not in my judgment in any sense a communication. It records nothing which passes between the solicitor and the client and it has nothing to do with obtaining legal advice. It is the same sort of record as might arise if a call were made on a dentist or a bank manager. A record of an appointment made does involve a communication between the client and the solicitor's office but it is not in my judgment, without more, to be regarded as made in connection with legal advice. So to hold would extend the scope of legal privilege far beyond its proper sphere, in my view. It is submitted on behalf of the Applicant that the doctrine is to be applied on an all or nothing basis, that either document is wholly entitled to legal professional privilege or none of it. That in my judgment is not so".

Accordingly even if there are elements of this conveyancing file which do attract legal professional privilege it would be possible to have such items excluded without necessarily preventing the production of the relevant parts of the file.

Accordingly I hold, subject to the comment immediately above, that this file should be produced.

As already pointed out the discovery of this file does not involve disclosure of the documents to any third party as the person seeking production of the file was in fact a party to the transaction herself.

Lastly, given the nature of the allegations that have been made, it would be proper that the parents of the Respondent be added as parties to these proceedings as they, I am told, remain the registered owners of the property in question and I intend to so order.